

THE SPORTSMEN'S MARINA §
d/b/a SPORTSMAN MARINA AND §
DRY DOCK §
27844 CANAL ROAD §
ORANGE BEACH, AL 36561, §

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NOS. S. 11-123
S. 11-318

ZEKE'S LANDING MARINA, LLC §
P.O. BOX 2500 §
ORANGE BEACH, AL 36561-2500, §

Taxpayers, §

v. §

STATE OF ALABAMA §
DEPARTMENT OF REVENUE.

OPINION AND PRELIMINARY ORDER

The Revenue Department separately assessed the Sportsmen's Marina and Zeke's Landing Marina, LLC (together "Taxpayers") for State sales tax for July 2005 through February 2010 and April 2004 through March 2010, respectively. The Taxpayers appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. The cases were consolidated and heard together on August 2, 2011. Duane Graham and Brandon Hughey represented the Taxpayers. Assistant Counsel Duncan Crow represented the Department.

ISSUES

The Taxpayers sold diesel fuel to charter fishing boat operators in Alabama during the periods in issue. The primary issue is whether the diesel fuel was exempt from sales tax pursuant to Code of Ala. 1975, §40-23-4(a)(27). That statute exempts the sale of fuel for use in "commercial fishing vessels." The issue turns on whether charter fishing boats are commercial fishing vessels within the purview of the exemption.

A second issue is whether the diesel was exempt from sales tax pursuant to Code of Ala. 1975, §40-23-4(a)(10). That statute exempts the sale of fuel used on vessels engaged in international or interstate commerce.

The final assessment against Sportsmen's Marina involves a 56 month period, and the final assessment against Zeke's Landing covers a 72 month period. The Department agreed at the August 2 hearing that the general 36 month statute of limitations for assessing tax at Code of Ala. 1975, §40-2A-7(b)(2) applies, and that all months outside of the 36 month statute should be deleted from the final assessments, except for May 2006 concerning Zeke's Landing. The Department argued at the August 2 hearing that May 2006 could be assessed against Zeke's Landing pursuant to the six year 25 percent omission statute, Code of Ala. 1975, §40-2A-7(b)(2)b. The Department now concedes that the 6 year statute does not apply, and consequently, that May 2006 is also out of statute.¹ See, Department's Post-Hearing Brief at 7.

FACTS

The Taxpayers operate marinas in Gulf Shores, Alabama at which they sell various items, including diesel fuel, to charter fishing and other vessels. The Taxpayers failed to report and remit sales tax to the Department on their sales of diesel fuel to charter fishing boats during the periods in issue. Zeke's Landing also failed to pay sales tax on its diesel sales to other boats during those months. It now concedes that the sales to the other

¹ The Department entered preliminary assessments against both Taxpayers on May 19, 2010. Section 40-2A-7(b)(2) allows generally that the Department can assess a taxpayer within three years from the due date of the return. The Taxpayers' April 2007 returns were due on May 20, 2007. The month of April 2007 and all subsequent months were thus timely assessed.

boats were taxable, and that it owes sales tax on the diesel sold to those boats.

The Department audited the Taxpayers and determined that the Taxpayers' diesel sales were taxable. It assessed the Taxpayers accordingly.

The charter fishing boats in issue are almost all owner operated, although a few owners employ a captain to operate their boats. The boats are used exclusively to take individuals fishing in the Gulf of Mexico. The customers pay the boat operators, who in return provide the customers with the equipment, supplies, and services needed for a successful fishing trip. The fish caught on a charter fishing trip are not sold at retail or wholesale by the boat operator. Rather, they are generally cleaned by a crew member and taken by the boat's customers.

The State of Alabama requires charter fishing boats that operate in Alabama's waters to obtain an annual "commercial party boat" license. Charter fishing boats are also required to obtain various federal permits.

The Alabama Attorney General issued an opinion on May 18, 1998 addressing the issue of whether the sale of diesel fuel to "commercial charter-fishing vessels" is exempt from sales tax pursuant to §40-23-4(a)(27). The opinion concluded that "[t]he sale of diesel fuel for use aboard a charter-fishing vessel is subject to sales tax unless it can be factually determined that the vessel's owners or masters are 'regularly and exclusively engaged in the business of commercial fishing.'"

In late May 1998, the City of Orange Beach determined that diesel fuel sold to charter fishing boats in the City was exempt from the City's sales tax based on the above Attorney General's opinion.

ANALYSIS

Section 40-23-4(a)(27) reads as follows:

The gross proceeds from the sale or sales of fuel for use or consumption aboard commercial fishing vessels are hereby exempt from the computation of all sales taxes levied, assessed, or payable under the provisions of this division or levied under any county or municipal sales tax law.

The words commercial fishing vessels shall mean vessels whose masters and owners are regularly and exclusively engaged in fishing as their means of livelihood.

Department Reg. 810-6-3-.67.03(5) addresses the exemption, and reads as follows:

(5) The gross proceeds of sales of fuel for use or consumption aboard commercial fishing vessels are exempt from sales and use tax. This exemption does not apply to supplies used or consumed aboard commercial fishing vessels. Commercial fishing vessels shall mean vessels which are regularly and exclusively engaged in the business of commercial fishing, shrimping, crabbing, oystering, or any other type of activity resulting in the gathering of fish or crustaceans for sale at wholesale or retail. (Sections 40-23-4(a)(27) and 40-23-62(27))

The Department argues that charter fishing boats are not commercial fishing vessels because the owners/operators do not sell the fish that are caught on a fishing trip. "Charter boat captains do not receive money for selling fish or other seafood at retail or wholesale. Charter boat captains earn their living from carrying people for hire." Department's Answer at 2. The above position is based on Reg. 810-6-3-.67.03(5), which, as stated above, provides in part that "[c]ommercial fishing vessels shall mean vessels which are regularly and exclusively engaged in the business of commercial fishing, . . . , or any other type of activity resulting in the gathering of fish or crustaceans for sale at wholesale or retail."

The above language in the regulation provides that a vessel is a commercial fishing vessel only if it catches or gathers fish for sale. I agree with the Taxpayers, however, that the regulation improperly restricts the language of the exemption statute. That is, unlike the

regulation, the statute does not require that the fish caught by or on a commercial fishing vessel must be sold at retail or wholesale.

Section 40-23-4(a)(27) defines “commercial fishing vessels” as “vessels whose masters and owners are regularly and exclusively engaged in fishing as their means of livelihood.” That statutory definition controls. It is undisputed that the charter fishing boat operators that purchased diesel from the Taxpayers during the subject periods were regularly and exclusively engaged in operating the charter boats as their means of livelihood. The determinative issue is thus whether operating a charter fishing boat constitutes “fishing.”

“Fishing” is not defined by the Alabama Revenue Code, Title 40, Code 1975. In such cases, a word must be given its plain, commonly understood meaning in everyday usage. *Imed Corp. v. Systems Engineering Associates Corp.*, 602 So.2d 344 (Ala. 1992). The *American Heritage Dictionary*, Fourth Ed., defines “fishing” at page 524 as “[t]he act, occupation, or sport of catching fish.” A charter fishing boat is clearly engaged in fishing because it involves the act, occupation, and also the sport of catching fish. It is irrelevant that the boat’s customers land the fish, and not the boat’s captain or crew. Because charter fishing boat owners/operators are exclusively engaged in fishing as their means of livelihood, they are entitled to the fuel exemption at §40-23-4(a)(27).

The above holding is affirmed by the fact that charter fishing boats are commonly recognized as commercial fishing vessels. The May 18, 1998 Attorney General’s opinion on the subject indicated that whether the §40-23-4(a)(27) exemption applies to a charter fishing boat must be determined on a case by case basis. If, however, charter fishing boats are per se not commercial fishing vessels because they do not sell the fish they catch, then

the exemption could never apply. The opinion thus presumes that charter fishing boats are commercial fishing vessels, but that the exemption applies only when such boats are “regularly and exclusively engaged in the business of commercial fishing. . . .” The exemption would not apply, for example, to fuel purchased by a boat that conducted charter fishing trips but also conducted dolphin viewing cruises and/or hauled supplies to offshore oil rigs because the boat would not have been used “exclusively” for commercial fishing. As indicated, the charter fishing boats in issue were regularly and exclusively engaged in fishing.

The Alabama Department of Conservation also recognizes charter fishing boats as commercial in nature because it issues such boats a “commercial party boat” license. The City of Orange Beach also recognizes that charter fishing boats are commercial fishing vessels within the purview of the exemption statute because immediately after the May 18, 1998 Attorney General’s opinion was issued, the City determined that fuel sold to charter fishing boats within the City limits was exempt from the City sales tax. I also note that the *American Heritage Dictionary* cited above defines “commercial” at page 288, as “[h]aving profit as a chief aim.” The charter fishing boats in issue clearly have profit as a chief aim.

An exemption statute must be strictly construed against the taxpayer and for the Department. *Bean Dredging Corp. v. State of Alabama*, 454 So.2d 1009 (Ala. 1984). But the overriding rule of statutory construction is that the intent of the Legislature as expressed in the language of a statute must control. *Gholston v. State*, 620 So.2d 719 (Ala. 1993). The language of the §40-23-4(a)(27) exemption clearly encompasses the sale of fuel to commercial charter fishing boats engaged regularly and exclusively in fishing as a means of livelihood. “The provisions of a statute will prevail in any case of a conflict between the

statute and an agency regulation.” *Ala., Dept. of Revenue v. Jim Beam Brands Co., Inc.*, 11 So.3d 858, 864 (Ala. Civ. App. 2008). Consequently, Reg. 810-6-3-.67.03(5) is rejected to the extent it improperly narrows the statute to require that the exemption applies only to vessels that gather fish and other seafood for sale at wholesale or retail.

The second issue concerning the §40-23-4(a)(10) exemption for boats engaged in international or interstate commerce is pretermitted by the above holding. I note, however, that the Court of Civil Appeals held in *State, Dept. of Revenue v. Orange Beach Marina, Inc.*, 699 So.2d 1279 (Ala. Civ. App. 1997) that “charter fishing vessels are not engaged in interstate commerce and that those diesel fuel sales are not exempt” pursuant to the §40-23-4(a)(10) exemption. *Orange Beach Marina*, 699 So.2d at 1281. It is unclear if the Court based its finding on the fact that charter fishing boats failed to meet the statutory presumption in §40-23-4(a)(10) that vessels that transport cargo between Alabama ports and foreign ports or ports in other states are engaged in foreign or interstate commerce; or whether the Court found as a fact that charter fishing boats are not engaged in interstate commerce regardless of the statutory presumption. That question need not be decided, however, given that the diesel sales in issue are otherwise exempt pursuant to §40-23-4(a)(27).

Zeke’s Landing concedes that it owes sales tax on its diesel sales to boats other than charter fishing vessels. The Department should compute and notify the Administrative Law Division of the tax owed by Zeke’s Landing for the period April 2007 through March 2010. A Final Order will then be entered voiding the final assessment against Sportsmen’s Marina and reducing the final assessment against Zeke’s Landing.

This Opinion and Preliminary Order is not an appealable Order. The Final Order,

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

Entered November 8, 2011.

BILL THOMPSON
Chief Administrative Law Judge

bt:dr

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