

STATE OF ALABAMA §  
DEPARTMENT OF REVENUE, §

STATE OF ALABAMA  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE LAW DIVISION

v. §

DOCKET NOS. MISC. 88-118  
MISC. 87-236

GOLD STAR PETROLEUM, INC. §  
AND HILL PETROLEUM CO. §  
P.O. Box 11151 §  
Spring, TX 77391-1151, §

GOLD STAR PETROLEUM, INC. §  
AND MANSFIELD OIL CO., §  
P.O. Box 11151 §  
Spring, TX 77391-1151, §

Petitioners. §

FINAL ORDER OF COMMISSIONER OF REVENUE

Pursuant to §41-22-16(a)(2), Code of Alabama 1975, a Recommended Order has been submitted to the Commissioner of Revenue by the Administrative Law Judge of the Department of Revenue in the above-consolidated actions. Having reviewed the record, consisting of testimony recorded by a Certified Court Reporter, as well as exhibits, and the Recommended Order of the Administrative Law Judge, it is the opinion of the Commissioner that the Recommended Order of the Administrative Law Judge is due to be set aside and the following Order is due to be entered:

FINDINGS OF FACT

A review of the testimony reveals that there are no disputed material facts. The Petitioners Gold Star Petroleum, Inc. ("Gold Star") and Hill Petroleum Company ("Hill") filed a Joint Petition for Refund of gasoline and motor fuel excise tax for the months of May, June and July, 1987. The Petitioners Gold Star and Mansfield

Oil Company ("Mansfield") filed a similar Joint Petition concerning the months of May and June, 1987. The Revenue Department denied both Petitions and the Petitioners requested a hearing pursuant to the provisions of the Alabama Administrative Procedure Act, codified at §41-22-1, et seq., Code of Alabama 1975. The two petitions for refund were consolidated and a hearing was conducted by the Administrative Law Division on December 7, 1988.

During the months involved in the subject petitions, Gold Star purchased gasoline and motor fuel from both Hill and Mansfield for the specific purpose of reselling the products under a contract with the U.S. Government. At the time of its purchases from Hill and Mansfield, Gold Star had not obtained the license required for engaging in the business of selling and distributing gasoline in Alabama as is required by §40-12-191, Code of Alabama 1975. Gold Star applied for such license soon after it was awarded the U.S. Government contract in question.

Hill and Mansfield, both licensed distributors in Alabama, paid the gasoline and motor fuels excise tax on the products to the Department. The U.S. Government paid Gold Star for the gasoline and motor fuel. Gold Star subsequently paid Hill and Mansfield, including reimbursement for the taxes previously paid by Hill and Mansfield.

A Department employee informed Gold Star in early May, 1987 that gasoline sold to the U.S. Government would be exempt, and Gold

Star's license would be issued and dated retroactively to cover Gold Star's operation in Alabama if Gold Star properly filed an application and completed all bonding requirements. The Department's policy at the time was to allow backdating of the license "for a short period" under certain circumstances. Gold Star filed an application for a gasoline distributor's license along with a bond in- May, 1987. However, Gold Star failed to supply certain required documents and the bond was deemed by the Department to be insufficient. Gold Star was then required to obtain a second bond from its bonding company. The bonding company delayed in issuing the second bond, and the Department refused to issue a "backdated" license. The Department issued a license to Gold Star on July 13, 1987. The license was dated and became effective on that date.

#### STATEMENT OF THE ISSUE

As stated by the Administrative Law Judge, the issue to be decided is: "Whether Gold Star's failure to be licensed at the time it purchased the gasoline and motor fuel in question should prevent a refund of the tax paid to the State by Hill and Mansfield?"

#### CONCLUSIONS OF LAW

Section 40-17--30, et seq. , Code of Alabama 1975 imposes an excise tax upon every distributor, refiner, retail dealer, storer or user of gasoline in the State of Alabama. Section 40-17-31 is the levying section of the Alabama Gasoline Excise Tax Law.

Subsection (a) of §40-17-31 provides in part:

Every distributor, refiner, retail dealer, storer or user of gasoline shall collect and pay over to the state department of revenue an excise tax of \$.07 per gallon upon the selling, use or consumption, distributing, storing or withdrawing from storage in the state for any use of gasoline as defined or otherwise referred to in this article . . . . provided, that when any excise tax imposed by this section upon the sale, use or consumption, distribution, storage, withdrawal from storage in this state of such gasoline shall have been paid to the state by a distributor, refiner or by any retail dealer, storer or user, such payment shall be sufficient, the intent being that the tax shall be paid to the state but once.

From the above-quoted portion of the levying section contained in the Alabama Gasoline Excise Tax Law, two points are abundantly clear: (1) the tax is imposed upon the distributor, refiner, retail dealer, storer or user of gasoline for the privilege of selling, using or consuming, distributing, gasoline as storing or withdrawing from storage for any use gasoline as defined in the excise tax law; and, (2) where the excise tax imposed by §40-17-31 is paid to the State by a distributor, refiner, retail dealer, storer or user, then such payment shall be sufficient, it being the intent that the tax shall be paid to the State but once.

While it is true that the intent of the gasoline excise tax law is for the tax to be passed along to the ultimate consumer in the price of a gallon of gasoline, subsection (a) makes it abundantly clear that the tax is in fact imposed upon the distributor, storer or retail dealer. State Tax Commission v. County Board Education, 235 Ala. 388, 179 So.198 (1938).

Furthermore, subsection (a) plainly provides that if the distributor should pay the tax on the withdrawal and distribution of gasoline, then such payment shall be sufficient under the provisions of the Gasoline Excise Tax Law. Thus, the Legislature has recognized that even though the tax may ultimately be passed along to the consumer, payment by the distributor in such cases as when gasoline is sold to an unlicensed distributor is not only warranted but is contemplated.

The language found in §40-17-2, Code of Alabama 1975, which is the levying section of the Motor Fuels Law, is nearly identical to that language in the Gasoline Tax Law, which manifests an intent that the motor fuel tax be collected but once. However, the Motor Fuel Tax Law does not contain any specific companion language indicating that it was the intent of the Legislature that the Diesel Fuel Tax be passed on to the consumer.

While it is true that it is the intent of the Legislature that the gasoline and motor fuel tax be borne by the ultimate consumer, there are numerous requirements contained within the Diesel Fuel and Gasoline Tax Law which require that only those persons who are licensed with the Revenue Department as a distributor are entitled to sell such motor fuel and gasoline tax free.

Section 40-12-191, Code of Alabama 1975, provides in part:

Every distributor, before engaging in the business of selling, distributing or withdrawing from storage gasoline in this state, shall first make application to the department of revenue

upon forms prepared by the department of revenue, for a license to engage in said business. (Emphasis supplied).

Section 40-12-191 clearly requires every distributor to be licensed prior to engaging in the business of distributing or selling gasoline in Alabama. The decision of the Administrative Law Judge clearly ignores the statutory requirement of §40-12-191, and would give no effect whatsoever to the plain wording of this statutory requirement. Furthermore there are numerous provisions throughout both the Alabama Diesel Fuel Tax Law and the Gasoline Tax Law which make it abundantly clear that only those persons who are licensed by the Department of Revenue are entitled to sell motor fuel and/or gasoline tax free in Alabama.

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Section 40-17-11, Code of Alabama 1975, provides in pertinent part:

It is the intent of this article . . . that there shall be no tax liability when sales of motor fuels as defined herein are made to a user, distributor or storer who has obtained a license from the commissioner of revenue, as provided in §40-17-14, to make such purchases less the said tax and assume full liability therefore. (Emphasis supplied).

Section 40-17-12, Code of Alabama 1975, provides in part:

No person other than a licensed distributor, storer or user shall receive motor fuel for storage and subsequent delivery into the supply tank of a motor vehicle for the propulsion thereof on the public highways of this state unless he shall have applied for and secured from the commissioner a bulk purchaser's license.

(Emphasis supplied).

Section 40-17-14, Code of Alabama 1975, provides:

Before any person engages in the sale, withdrawal or use of motor fuels, as herein defined, for the operation of motor vehicles on the highways of this state on which fuels the tax levied by this article has not been paid to a licensed distributor, he shall make application to the department of revenue upon forms prepared by the department for a license, and such person shall post a bond for such sum as the commissioner may fix to secure the payment of the tax hereby levied, (Emphasis supplied).

Section 40-17-4, Code of Alabama 1975, also provides in part:

It shall be unlawful for any person to use in the operation of a motor vehicle over the highways of this state any motor fuel, as herein defined, upon which the tax levied hereby has not been paid or the payment thereof assumed by a distributor or storer or user licensed by the department of revenue. (Emphasis supplied).

In addition, §40-17-32, Code of Alabama 1975, manifests a clear intent on the part of the Legislature that only sales between licensed distributors would be exempt from the payment of the gasoline excise tax. Section 40-17-32 provides in part:

The excise tax imposed by §40-17-31 shall be collected by persons, as defined in this article, storing gasoline or distributing the same or allowing the same to be withdrawn from storage, . . . provided, that receipts by any licensed distributors or storers from another licensed distributor or storer shall be treated on the same basis as gasoline received or distributed by such licensed distributors or storers in interstate commerce. (Emphasis added).

Section 40-17-36 requires all distributors engaged in the sale or withdrawal of gasoline in Alabama to report to the Department of

Revenue the place and address at which the distributor is engaged in the business of selling gasoline, and provides in pertinent part:

No person shall become a distributor, refiner, storer or seller of gasoline in this state until he shall have made such reports to the department of revenue.

Section 40-17-38, Code of Alabama 1975, provides that a discount shall be allowed to licensed distributors and provides in part:

The Commissioner of the department of revenue is hereby authorized and directed to allow refiners, storers, distributors or wholesalers, as defined §40-17-30, who have been licensed by the department of revenue under the provisions of §40-12-191, and who have made bond, as is required under §40-12-194, a discount . . . (Emphasis supplied).

In addition, the very statute relied upon by the Petitioners in the present action manifests a clear intent that only those persons who are licensed by the Department of Revenue as distributors are entitled to claim the exemption applicable for the sale of gasoline to the United States Government. Section 40-17-31(b), Code of Alabama 1975, provides in pertinent part:

Any person in reporting and paying the tax to the department may deduct the number of gallons of gasoline or other fuels taxed by this section sold to the United States, as shown by such certificate of exemption duly executed by the United States and filed with such report, and the department is authorized to adopt rules and regulations with respect to the issuance and use of such certificates.

Under the very exemption which the Petitioners are citing as authority for their claim, it is clear that only the person who is



reporting and paying the tax to the Department is entitled to claim the exemption for gasoline sold to the United States; and that the claimed exemption must be included in the monthly report due to be filed with the Department by the previously licensed distributor.

Gold Star was not entitled to claim the exemption because it could not have filed any such certificates with its reports since it was not licensed, and was not reporting and paying gasoline tax to the State of Alabama.

The Department is correct that §40-12-191 requires that all distributors operating in Alabama must obtain a license to operate in the State. Section 40-17-196 further provides that any person operating without a license shall be prevented from operating for one year and that such action shall constitute a misdemeanor. The right to deduct sales to the United States extends only to those "reporting and paying the tax to the Department." Section 40-17-31(b).

Operation in the State in a manner requiring "reporting" is prohibited by statute, unless certain prerequisites are met, and a license is issued. Section 40-12-191. Since a license had not, at the time in question, been issued any activity in this State which would have required a "reporting" was unlawful. The statute must be construed to mean a "lawful" reporting.

In addition, the decision of the Administrative Law Judge loses sight of the fact that it was not the sale to the United States

Government upon which the Alabama gasoline tax and diesel fuel taxes were imposed, but instead the tax was levied on the sales of the fuels to Gold Star by Hill Petroleum and Mansfield Oil. The Administrative Law Judge's decision simply ignores the numerous statutory requirements contained in the Diesel Fuel Tax Law and the Gasoline Tax Law which require the licensing of a distributor prior to engaging in the business of selling gasoline and motor fuel in Alabama.

The motor fuel and gasoline excise taxes are not levied on the ultimate consumer as concluded by the Administrative Law Judge. Both excise taxes are actually levied on the person who engages in the business of distributing the gasoline and motor fuel. Both laws simply provide that it is the intent of the Legislature that the taxes be passed along to the consumer in the price of the product.

In those situations where the ultimate consumer may be exempt from tax, then such sales to an exempt consumer must also be considered exempt; provided all applicable provisions of the law have been observed and obeyed. In the instant case, Gold Star, by failing to obtain a license as a motor fuel distributor and as gasoline distributor prior to engaging in the business of making sales of said fuels, failed to comply with the applicable provisions of the diesel fuel and gasoline tax laws. Therefore, the sales by Hill Petroleum and Mansfield oil to an unlicensed distributor must be considered taxable transactions, and the

petition for refund is due to be denied.

In the alternative, assuming arguendo the Administrative Law Judge's position that "the gasoline excise tax is on the ultimate consumer" (and is thus similar to the Sales Tax Law), the logic of the Administrative Law Judge must still fail because it is recognized in Alabama that under such a "transactional" tax as the sales tax, the law requires that a sale by a wholesaler to an unlicensed retail dealer be deemed a retail sale. State v. Advertiser Co., Ala. Civ. App. 337 So.2d 942, cert. quashed, 337 So.2d 947 (1976); State v. Link Enterprises., Inc., Ala. Civ. App. 386 So.2d 1177 (1980). Thus assuming that the Alabama Gasoline and Diesel Fuel Excise Taxes are similar to the Alabama Sales Taxes in that they are "transactional" taxes placed on the ultimate consumer, Alabama law is clear to the point that a sale to an unlicensed retail dealer is in fact a taxable sale.

Based on the above and foregoing, IT is, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Recommended Order of the Administrative Law Judge is hereby set aside, overturned, reversed, and otherwise held for naught. Furthermore, the joint petitions for refund of Gold Star Petroleum, and Hill Petroleum Company, as well as the joint petitions for refund of Gold Star Petroleum and Mansfield Oil Company are hereby denied.

DONE and ORDERED on this the 8th day of September, 1989.

JAMES M. SIZEMORE, JR., Commissioner