STATE OF ALABAMA, DEPARTMENT OF REVENUE, vs. SHELL OIL COMPANY P. O. Box 1523 Houston, TX 77251, Taxpayer.	§ § § § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. MISC. 88-125

FINAL ORDER

The Revenue Department denied three petitions for refund of wholesale oil license tax filed by Shell Oil Company (Shell or Taxpayer) for the fiscal years ending September 30, 1983, September 30, 1984, and September 30, 1985. The Department also assessed additional wholesale oil license tax against Shell for the period October, 1982 through September, 1986. Shell appealed to the Administrative Law Division. Randall G. Durfee represented Shell. Assistant counsel Dan Schmaeling represented the Department.

FINDINGS OF FACT

This case involves the wholesale oil license tax levied at Code of Ala. 1975, §40-17-174. The wholesale oil license tax is measured by fuel oil sold at wholesale within Alabama.

The primary issue in dispute is whether sales of diesel fuel by Shell and involving a separate corporation, Shell International Trading Company (Sitco), were wholesale sales by Shell to Sitco in Alabama, in which case the tax would be due, or retail sales by Shell to the final consumer, in which case no tax would be due. A

second issue involves the Department's method for computing penalty and interest against Shell.

The Department's position concerning the primary issue is that Shell made wholesale sales to Sitco in Alabama as evidenced by invoices from Shell to Sitco. Shell's position is that Sitco acted only as a middleman or accounting hub in the transactions. Shell argues that Sitco's sole function was to arrange and coordinate the sales by Shell to the final customer, and that the invoices relied on by the Department are only internal billing records and do not establish a sale from Shell to Sitco. The relevant facts are set out below.

Shell sells marine fuel and other petroleum products at its facility in Mobile Bay. The sales in issue were made pursuant to the International Marine Assignment Agreement. The Agreement provides an efficient, uniform procedure by which Shell, Sitco and various other member oil companies are able to contract and arrange for the sale and delivery of marine fuel at ports throughout the world. Under the Agreement, Sitco gathers and disseminates information concerning the availability and price of fuel at various locations, and also coordinates and acts as a middleman on specific sales involving member companies.

The sales in issue evolved as follows: A customer contacted a member oil company (contracting company) about buying bunker fuel for a ship in Mobile Bay. Bunker fuel is the fuel used to propel

a ship. The contracting company did not have the required fuel available at Mobile, and consequently contacted Shell about filling the contract. Shell agreed to provide the fuel at the designated price. The contracting company then issued a bunker nomination to Shell directing Shell to make the delivery. The bunker nomination also guaranteed that Shell would be paid in full by the contracting company.

Shell arranged for the fuel to be delivered to the customer and then notified Sitco after the fuel was delivered. Sitco (or the contracting company, depending on their individual agreement) then billed the customer. The customer paid the contracting company, who in turn paid Shell by remitting payment to Sitco. Sitco then deposited the money in a designated Shell bank account.

An invoice was issued by Shell after the fuel was delivered to the customer naming Sitco as purchaser. The Department relies on that invoice as proving a wholesale sale by Shell to Sitco. However, the invoice was issued for internal inventory control purposes only. The invoice was never physically delivered to Sitco. Sitco was designated as purchaser on all of the invoices because Shell wanted only one Sitco billing account instead of numerous accounts in the names of the actual buyers.

The above transactions do not involve wholesale sales by Shell to Sitco. Rather, the fuel was sold at retail by Shell to the final customer. Sitco acted as an accounting hub only and did not

buy or sell the fuel. The invoices from Shell to Sitco in form indicate a sale to Sitco, but in substance the invoices were issued for internal accounting purposes only and do not prove a sale to Sitco. In tax matters, substance over form must govern. State v. Rockaway Corp., 346 So.2d 444. Consequently, the Alabama wholesale oil license tax is not due on the sales in issue.

In light of the above, the second issue concerning the computation of penalty and interest by the Department is moot. However, so the parties will understand my position on the subject, I have addressed the issue below.

The Department's audit (which included as taxable the above discussed nontaxable sales) indicated that Shell overpaid tax in 1983 and 1984 and underpaid tax in 1985 and 1986. In total, Shell overpaid tax for the four-year period by $13,588.00.

However, for penalty and interest purposes the Department did not allow the Taxpayer a credit for the overpayments in 1983 and 1984 against the underpayments in 1985 and 1986. That is, the Department assessed penalty and interest on the amounts underpaid in 1985 and 1986 without first allowing an off-setting credit for the prior overpayments. As a result, although the Department concedes that the Taxpayer overpaid tax by over $13,588.00 during the four-year period, the Department assessed additional penalty and interest against the Taxpayer totalling approximately

$38,500.00. In my opinion, the penalty and interest was incorrectly assessed by the Department.

The issue was previously addressed in Docket No. MISC. 91-130. In that case, the Department assessed additional penalty and interest in each month that the distributor underpaid tax, without allowing an off-setting credit for overpayments made in prior months. As a result, the Department assessed penalty and interest of approximately $32,400.00 over a 34 month period based on a net tax deficiency of only $4,100.00. I ruled against the Department and held that a credit should be allowed for prior overpayments against any subsequent underpayments before computing penalty and interest. The same holds true in this case. Even if the sales in issue had been taxable, the amounts overpaid in 1983 and 1984 should have been applied to offset the tax due in 1985 and 1986, and no penalty or interest would be due.

In addition, Code of Ala. 1975, §40-17-180, which involves the wholesale oil license tax, provides "that the money actually paid shall constitute a credit against the money actually due. In the event of the payment of an amount in excess of the amount due, the state department of revenue may credit such excess upon the amount of tax due for any subsequent monthly period, . . ." In other words, §40-17-180 specifically authorizes the Department to allow a credit against any deficiency for any tax previously overpaid by a taxpayer.

The above considered, the assessment in issue is voided and the three petitions for refund should be granted. No interest should be paid on the refunds for the period prior to October 1, 1992 because no statute required payment of interest on refunds of wholesale oil license tax prior to that date. See, Sizemore v. Fisherman Marine Prods. Inc., 536 So.2d 73. However, Code of Ala. 1975, §40-1-44 was amended in conjunction with passage of the Uniform Revenue Procedures Act, Code of Ala. 1975, §40-2A-7, et seq., to require payment of interest on all refunds (with some minor exceptions), effective October 1, 1992. Consequently, the refunds should include interest computed from October 1, 1992 to the date the refunds are issued.

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

Entered on November 13, 1992.

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BILL THOMPSON
Chief Administrative Law Judge