

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

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v.

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DOCKET NO. MISC. 89-228

BAMA BLENDERS, INC.
P.O. Box 1112
Oneonta, AL 35121,

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Taxpayer.

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FINAL ORDER

The Revenue Department assessed wholesale oil license tax against Bama Blenders, Inc., A Corporation (Bama Blenders or Taxpayer) for the period October, 1986 through September, 1988. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on February 20, 1990. Gary S. Schiff, Esq. appeared for the Taxpayer. Assistant counsel John J. Breckenridge represented the Department. This Final Order is entered based on the evidence and arguments presented by the parties.

FINDINGS OF FACT

McPherson Oil Company (McPherson oil) is a licensed motor fuel distributor that purchases fuel oil at wholesale and resells the fuel at either wholesale or retail to its numerous customers. McPherson purchased large quantities of fuel oil during the period from Marathon Oil Company (Marathon Oil) during the period October, 1986 through September, 1988. In most cases, the fuel was purchased in the name of McPherson Oil. However, in some instances McPherson Oil purchased the fuel in the name of Bama Blenders to get a better price under Marathon Oil's two-tiered pricing system.

Bama Blenders is a separate corporation, but is not a licensed distributor, does not have a separate checking account, and has no assets. Bama Blenders and McPherson oil have identical corporate officers and owners. Bama Blenders conducts no independent business and the name is used by McPherson Oil only to take advantage of Marathon Oil's pricing system.

Bama Blenders purchased the fuel in question from Marathon Oil using McPherson Oil's license number. Bama Blenders never resold the fuel to McPherson Oil or any other third party. Rather, the fuel was in all cases picked up from Marathon oil by McPherson Oil trucks and subsequently resold by McPherson Oil at either retail or wholesale to McPherson Oil's numerous customers.

The fuel was paid for by checks issued in the name of Bama Blenders. However, the checks were drawn on the same account used by McPherson Oil. All money in the account belonged to McPherson Oil. McPherson Oil also maintains all of Bama Blenders' purchase records together with its own records.

The Department assessed the wholesale oil license tax levied at §40-17-174 against Bama Blenders computed on the gross sales from Marathon oil to Bama Blenders. The Department's position is that Bama Blenders is a separate entity that at some point resold the fuel at wholesale to McPherson Oil.

The Taxpayer disputes the assessment on several grounds. First, the Taxpayer argues that the fuel in question was not an

"illuminating, lubricating or fuel oil" within the scope of "illuminating, lubricating or fuel oil" within the scope of §40-17-174. The Taxpayer next argues that Bama Blenders did not sell the fuel at wholesale to McPherson Oil so as to be subject to the wholesale oil license tax. The Taxpayer also argues that Bama Blenders received no "gross sales" from McPherson oil upon which the tax can be measured. The Taxpayer further contends that Bama Blenders acted at all times as an agent or alter ego of McPherson Oil. Finally, the Taxpayer argues that a portion of the fuel never entered Alabama and thus should not be included in the measure of the wholesale oil license tax.

CONCLUSIONS OF LAW

The wholesale oil license tax is levied at §40-17-174 and provides in part as follows:

Each person, firm, corporation or agency selling illuminating, lubricating or fuel oils at wholesale, . . . , 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 of his gross sales for the preceding fiscal year. . . .

The tax is against the person, company or corporation selling fuel oils at wholesale, and is measured by the gross amount received by the wholesale seller.

In the present case, Bama Blenders acted at all times as de facto agent for McPherson oil in purchasing the fuel from Marathon Oil. However, even if separate corporate identities must be recognized for tax purposes, Bama Blenders is not liable for the

wholesale oil license tax because (1) it did not make any wholesale sales to McPherson Oil, and (2) it did not receive any "gross sales" by which the tax is measured.

To be liable for the tax, Bama Blenders must have resold the fuel to McPherson oil at wholesale. However, Bama Blenders never resold the fuel to McPherson Oil or any other party.

A "sale" is defined at §7-2-106(1) as "the passing of title from the seller to the buyer for a price". There was no price or other consideration paid by McPherson oil to Bama Blenders, and thus, no sale occurred. If title technically passed from Marathon Oil to Bama Blenders and then to McPherson Oil, the transactions between Bama Blenders and McPherson Oil can only be classified as gifts.

The Department cites as authority Reg. 810-8-1-.31, which provides that "sale" shall include "any barter, exchange, gift or other disposition." However, the regulation specifically relates to the diesel fuel tax levied at §40-17-2, and not the §40-17-174 wholesale oil license tax. Further, no statute, case law or other authority is cited in support of the proposition that a sale should be defined to include a gift, exchange "or other disposition" of property. Finally, even if a gift could be construed as a sale, Bama Blenders did not receive any "gross sales" from McPherson Oil on which the tax can be measured.

The Department argues that if Bama Blenders is not required to

pay the wholesale oil license tax, then every distributor will be allowed to escape the tax by setting up a dummy corporation to purchase its fuel. However, McPherson Oil has not escaped any tax by purchasing through Bama Blenders.

The substance of the transactions is that McPherson oil purchased fuel at wholesale from Marathon Oil, either in its own name or through Bama Blenders, and then resold the fuel either at retail or wholesale. The only parties that made wholesale sales were Marathon oil and McPherson Oil. Marathon oil paid the wholesale oil license tax on its total gross wholesale sales to Bama Blenders/McPherson Oil, and McPherson Oil also reported and paid the wholesale oil license tax on the fuel that it subsequently resold at wholesale. Thus, instead of escaping the tax, the Department would have Bama Blenders/McPherson Oil pay an additional tax based on wholesale sales from Bama Blenders to McPherson Oil that did not occur, and measured by "gross sales" that were not received.

The remaining issues raised by the Taxpayer are pretermitted by the above findings. The Department is hereby directed to reduce and make the assessment in issue final showing no additional tax due.

Entered this the 3rd day of April, 1990.

BILL THOMPSON
Chief Administrative Law Judge