STATE OF ALABAMA DEPARTMENT OF REVENUE,	§	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
v.	§	DOCKET NO. MISC. 89-230
A. B. DAVIS OIL COMPANY, INC. P. O. Box 124 Clayton, AL 36106,	§	
Taxpayer.	§	

FINAL ORDER

The Revenue Department assessed motor fuel tax against A. B. Davis Oil Company, Inc. (Taxpayer) for the periods January, 1987 through March, 1989 (Docket No. 89-230) and April, 1989 through June, 1991 (Docket No. 91-251). The Taxpayer appealed both assessments to the Administrative Law Division and the cases were consolidated and heard on February 12, 1992. Albert B. Davis appeared for the Taxpayer. Assistant Counsel Claude Patton represented the Department.

FINDINGS OF FACT

The Taxpayer is a licensed motor fuel distributor and maintains a bulk storage facility in Hartsford, Alabama. The Taxpayer also sells motor fuel at retail through two keylock pumps.

The Taxpayer periodically transfers fuel from the bulk storage facility into the keylock pump tanks. The Taxpayer's customers are assigned special keys that they use to operate the pumps. The pumps are specially metered to show how much fuel is purchased by each customer. The Taxpayer subsequently bills each customer weekly and also at the end of each month.

The Taxpayer filed monthly motor fuel returns during the subject periods and reported tax on the motor fuel sold through the two pumps for on-road use. The Department agrees that the Taxpayer maintained adequate records showing which fuel was sold for off-road and on-road purposes.

The Department audited the Taxpayer and assessed additional tax based on the total amount transferred from the bulk storage facility into the keylock pump tanks, less a credit for the fuel that was subsequently sold for off-road use. That is, the additional tax is based on the amount of fuel remaining in the keylock tanks at the end of each audit period.

The Department argues that the tax became due pursuant to code of Ala. 1975, §40-17-11(2) when the gasoline was withdrawn from the bulk storage facility and delivered into the keylock pump tanks. Section 40-17-11(2) provides that tax is due when a distributor or storer delivers fuel "into dispensing equipment of a retail dealer designed and used to supply motor fuel into the fuel supply tank of a motor vehicle for the propulsion thereof on the public highways of this state."

The Taxpayer claims that the tax is due on only the fuel actually sold through the two keylock pumps for on-road use. The Taxpayer also maintains that the two keylock pumps are not retail dispensing devices because they are not available to the general public.

CONCLUSIONS OF LAW

Section 40-17-2 levies a motor fuel tax on the selling, distributing, storing or using of motor fuel used in on-road vehicles. Section 40-17-3 provides that (1) a distributor shall pay on sales, (2) a storer shall pay on withdrawals, and (3) a user shall pay on the amount used.

However, pursuant to §40-17-11, a distributor or storer is not liable unless (1) the fuel is delivered into the tank of a vehicle used on-road, (2) the fuel is delivered into the dispensing equipment of a retail dealer that sells to on-road vehicles, or (3) the distributor or storer knows or has reason to believe that the fuel is to be used for on-road purposes. Section 40-17-11 also provides that sales to a licensed distributor, storer or user shall be tax free.

The Department claims that §40-17-11(2) applies and that the tax became due when the Taxpayer transferred the fuel from the bulk storage facility into the keylock pump tanks. However, the intent of §40-17-11(2) is for the tax to attach when a distributor sells and then delivers fuel into the retail pump tanks of an unlicensed retail dealer for sale to on-road vehicles (sales to licensed dealers are tax free). Section 40-17-11(2) doesn't apply when a licensed distributor transfers his own fuel from a bulk storage facility into his own dispensing equipment for subsequent sale. Rather, in that case the distributor/ retail dealer is liable only

when the fuel is subsequently sold for on-road purposes, see §40-17-11(1).

If the Taxpayer bad purchased the fuel in issue from another distributor instead of withdrawing from its own bulk storage facility, the sale to the Taxpayer would have been a tax-free sale to a licensed distributor and the tax would be due only when the fuel was sold through the keylock pumps for on-road purposes. Likewise, if the Taxpayer had withdrawn and delivered the fuel into the retail pump tanks of another licensed distributor, and not into its own tanks, those transactions would also be tax-free. It is illogical to argue that the Taxpayer could buy the fuel tax-free from another distributor, or sell tax-free to another licensed distributor, but that the withdrawal of its own fuel for sale through its own retail pumps is taxable.

In summary, a licensed distributor that withdraws fuel from his own bulk storage facilities and delivers the fuel into his own retail dispensing equipment is liable for the tax only when the fuel is subsequently sold for on-road purposes. In this case, the Taxpayer properly paid tax on the fuel sold through the keylock pumps for on-road use. Consequently, the preliminary assessment in issue is incorrect and should be made final showing no additional tax due.

Entered on March 10, 1992.

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BILL THOMPSON

Chief Administrative Law Judge