

STATE OF ALABAMA
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

v.

§

DOCKET NO. MISC. 90-247

ALABAMA OIL SUPPLY
P. O. Drawer 336
Bessemer, AL 35021,

§

§

Taxpayer.

§

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-styled action. 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 upheld, and therefore the following Order is due to be entered:

FINDINGS OF FACT

The Petitioner Is a motor fuel distributor and is required to file a bond with the Department in twice the amount of its monthly tax liability. §40-12-194, Code of Alabama 1975. The Petitioner presently has two \$25,000.00 bonds on file with the Department. The issue in dispute is whether the Petitioner should be required to file an additional \$150,000.00 bond with the Department.

The Department notified the Petitioner an February 5, 1990 that the Petitioner's bond requirement was being increased to

4200,000.00 based on the Petitioner's increased average monthly tax liability of \$100,000.00. The Department was also concerned that the Petitioner would be unable to pay a large audit deficiency for the period November, 1986 through October, 1989 in the amount of \$1,434,759.43. The deficiency is disputed by the Petitioner and is presently an appeal before the Administrative Law Division.

The Petitioner offered to file an additional bond totaling 4130,000.00 and the Department accepted by letter dated March 2, 1990. However, the Petitioner was unable to obtain any additional bond and requested that the Department accept the two bonds presently on file. The Department refused and again demanded a total bond of \$200,000.00 by letter dated April 11, 1990.

The Department subsequently requested the Petitioner's current financial statements on May 24, 1990. The Petitioner provided the statements on June 14, 1990. The Department reviewed the statements and informed the Petitioner on June 18, 1990 that the statements were insufficient and that the Petitioner's motor fuel license would be cancelled unless a \$200,000.00 bond was posted before July 9, 1990. The Petitioner appealed to the Administrative Law Division on July 3, 1990.

The Department rejected the Petitioner's financial statements because they indicated a net loss of \$79,012.00 for the eight months ending May 31, 1990. The Department believed that the Petitioner was "liquidating the net worth of the company" and would

be unable to pay its taxes if it continued to lose money. The balance sheet also showed retained earnings of 4184,034.00 and total stockholders' equity of \$185,034.00.

The Petitioner provided the Department with a second, more favorable balance sheet as of August 31, 1990 showing net income of \$14,528.15 retained earnings of \$228,069.10 and total equity of \$232,002.02. The Petitioner also points out that it has never failed to file its monthly returns with the Department and pay the full amount due as reported on the returns.

CONCLUSIONS OF LAW

The Petitioner argues that the Department failed to comply with the procedures set out in §§40-12-194(c) and (d) because the Department failed to give the Petitioner a hearing and also failed to review the Petitioner's current financial statements prior to demanding an additional bond from the Petitioner. The Petitioner also contends that its current financial statements are sufficient and that an additional bond is not necessary and should not be required by the Department.

All motor fuel distributors are required by Code of Ala. 1975, §40-12-194(a) to file a bond with the Department in twice the amount of the distributor's average monthly tax liability. An additional bond above \$25,000.00 may be required after a review of the distributor's financial statements indicates that an additional

bond is necessary to protect the State's interest. See §40-12-194(d). Section 40-12-194(c) also requires that the Department conduct a hearing before determining that any existing bond is insufficient and demanding an additional bond from a distributor.

The Department failed to follow the provisions contained in both subsections (c) and (d) of §40-12-194. The Petitioner was not afforded a hearing and the Department failed to review the Petitioner's current financial statements before requesting an additional bond from the Petitioner.

The formal hearing conducted by the Administrative Law Division on October 11, 1990 did not cure the Department's failure to comply with the procedural requirements of §§194(c) and (d).

The Department must reinstitute proceedings by first reviewing the Petitioner's current financial statements to determine if an additional bond is necessary. The Department must be allowed discretion in reviewing the financial statements, and a determination that an additional bond is necessary will be upheld unless clearly unreasonable.

The Department must also give the Petitioner a hearing as required by §194(c). The Department may then demand an additional bond if it deems such action necessary, after which the Department may cancel the Petitioner's license unless the Petitioner files an additional bond or timely appeals.

Based on the above and foregoing IT IS, THEREFORE, ORDERED,

ADJUDGED AND DECREED that the Recommended Order of the Administrative Law Judge is hereby upheld and made final in the form as set out above. This cause is remanded to the Natural Resources Division for the hearing required by §40-12-194(c), Code of Alabama 1975.

DONE and ORDERED on this the 26th day of November, 1990.

JAMES M. SIZEMORE, JR., Commissioner