STATE OF ALABAMA, DEPARTMENT OF REVENUE, vs. BAMA OIL SUPPLY, INC. P. O. Box 608 Fayette, AL 35555, Taxpayer.	§ § § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. MISC. 91-206

OPINION AND PRELIMINARY ORDER

The Revenue Department assessed motor fuel tax against Bama Oil Supply, Inc. for the period September, 1987 through December, 1989. Bama Oil appealed to the Administrative Law Division and a hearing was conducted on December 10, 1991. Roy J. Crawford and Herbert Harold West, Jr. appeared for Bama Oil. Assistant counsel Dan Schmaeling represented the Department.

FINDINGS OF FACT

Bama Oil (Taxpayer) is a licensed motor fuel distributor based in Fayette, Alabama. The Taxpayer owns and operates three bulk storage/distribution facilities and also owns numerous retail outlets. The Taxpayer operates all of its retail outlets except two, which it leases to independent operators. The Taxpayer transfers fuel from the bulk facilities to the retail stations and retains title to the fuel until it is sold to the retail customer. The Taxpayer also makes retail sales directly from the bulk facilities.

The Department audited the Taxpayer and assessed additional motor fuel tax in six areas. The Taxpayer concedes that the sales

involving the Lamar County Board of Education, Marathon Equipment Company, and Franklin Oil Company were taxable. The Department concedes that the sales to Eskridge Auto Parts were tax-free. Withdrawals by the Taxpayer were also taxed, but the Taxpayer paid the tax due and the Department now agrees that the withdrawals should be removed from the audit.

The remaining issues involve (1) the taxability of the fuel transferred from the bulk facilities to the retail outlets, and (2) whether certain records offered by the Taxpayer are adequate to prove off-road sales.

Using the Taxpayer's distribution invoices, the Department taxed all of the fuel transferred from the bulk facilities to the retail outlets.[1]

The Department argues that tax became due when the fuel was delivered into the storage tanks at the stations based on Code of Ala. 1975, §40-17-11(2). The Department concedes that a credit could have been allowed for the fuel subsequently sold for off-road use if the sales had been separately metered and proper records maintained. However, the Department argues that the sales were not

[1]The Department also taxed the fuel delivered by the Taxpayer's suppliers directly to the outlets because those deliveries were invoiced by the Taxpayer for inventory control purposes as transfers from the bulk facilities.

separately metered, and thus no credits can be allowed, because both the on-road and off-road fuel was dispensed through a common pump and meter.

The Taxpayer failed to keep a copy of the individual sales tickets issued by the outlets, but did maintain weekly or daily sales summaries based on the sales tickets. The Taxpayer proffered those summaries as proof of off-road sales. The Department rejected the summaries based on its above-stated position that the fuel was taxable when delivered to the stations, and also because the sales were not separately metered.

The Department disallowed some individual invoices containing the designation "ORF" because they did not specify whether the sale was for on-road or off-road use. The Taxpayer's representative testified that "ORF" meant off-road fuel. Invoices identifying the seller as "BOS, Fayette, Alabama" were also rejected because they did not specify where the sale occurred. Other sales tickets obtained from the Taxpayer's customers were rejected, again because the sales were not separately metered. The Taxpayer argues that the above invoices are adequate and substantially comply with Department Reg. 810-8-1-.46.

The Taxpayer points out that over 60% of the fuel not in dispute (either conceded as taxable by the Taxpayer or tax-exempt by the Department) was sold for off-road use. The Taxpayer contends that the same type customers, i.e. miners, loggers, etc., that bought the fuel not in dispute, also purchased the fuel in

issue. The Taxpayer thus argues that the same 60% tax-free figure would also apply to the disputed sales.

CONCLUSIONS OF LAW

The motor fuel tax is levied on the sale, distribution, consumption, storage, or withdrawal from storage of motor fuel used for on-road purposes. Code of Ala. 1975, §40-17-2. However, although the tax is broadly levied on the above activities, Code of Ala. 1975, §40-17-11 specifies that a distributor or storer is not liable except in three instances:

> (1) Where the distributor or storer delivers such motor fuel into the fuel supply tank of a motor vehicle for the propulsion thereof on the public highways of this state;
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> (2) Where the distributor or storer delivers motor 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; or
>
> (3) Where the distributor or storer sells or distributes motor fuel, knowing or having good reason to know that the same is to be used for propelling motor vehicles on the public highways of this state.

The Department argues that paragraph (2) above applies in this case and that tax accrued when the Taxpayer delivered the fuel to the retail outlets. I disagree.

Distributors are liable only on "the basis of their sales". Code of Ala. 1975, §40-17-3. Thus, subparagraph (2) applies only if a distributor sells and delivers the fuel to an unlicensed

retail dealer for subsequent on-road sale (sales to licensed dealers are tax-free).[2]

[2] Section 40-17-11(2) on first reading appears to tax all fuel delivered into a retail dealer's supply tanks. However, to be consistent with subparagraphs (1) and (3), fuel should be taxed only if the distributor at the time of delivery knows or has reason to believe that the fuel will be used for taxable on-road purposes. A distributor obviously cannot know when he sells fuel to a retail dealer that resells for both on and off-road purposes whether the fuel will be used for a taxable purpose. Consequently, a distributor is not liable in that situation and instead the retailer becomes liable and must pay on the fuel subsequently sold for on-road use.

Section 40-17-11(2) applies if a distributor sells to a retailer that resells for only on-road use because only in that case can the distributor know when he sells the fuel that it will be used for a taxable purpose. The Department's practice of taxing

the distributor on all fuel delivered to a retailer and then allowing a credit for that portion later sold for off-road purposes by the retailer is rejected. Either the fuel is taxable when sold by a distributor or it is not, and a distributor's liability should not depend on whether the fuel is later sold for on or off-road purposes by the retailer. Also, the distributor's liability should not hinge on whether the retail dealer does or does not keep adequate records of off-road sales. Rather, as stated, the retailer is liable and must bear the consequences if he fails to keep good records.

Paragraph (2) does not apply if a distributor transfers fuel from storage into his own retail tanks for subsequent sale, or otherwise retains title until the sale at the pump. Paragraph (1) applies in that case and the distributor is liable only when the fuel is sold at the pump for on-road purposes. The above is supported by Department Reg. 810-8-1-.33, which provides that a stock transfer of fuel with the distributor retaining title is not a taxable distribution.

The Taxpayer owned the fuel in issue until it was sold at the station pumps. Consequently, §40-17-11(1) applies and tax did not become due until the fuel was sold at the pump for on-road purposes. The issue then is whether the pump sales (at both the retail stations and the bulk facilities) were separately metered and whether proper records were maintained as required by Code of Ala. 1975, §40-17-21.

The Department argues that "separately metered" requires that separate pumps and meters must be used, or that a single pump must have two meters, one registering on-road sales and one registering off-road sales. I disagree. In the context of §40-17-21, separate metering requires only that a single meter must be reset after each sale and the amount of each sale must be separately recorded. Separate pumps or independent meters are not required.[3]

[3]Department Reg. 810-8-1-.46 is rejected insofar as it requires a separate tank and pump for on-road and off-road sales.

The Department has promulgated three regulations concerning adequate records, Regs. 810-8-1-.09, 810-8-1-.46 and 810-8-1-.56. Reg. 810-8-1-.46 provides that an invoice must contain (1) an invoice number and date, (2) the number of gallons sold, (3) the purpose for which the fuel was purchased (off-road or on-road), and (4) the name and address of the purchaser. See also, subparagraph (1) of Reg. 810-8-1-.56. Absent a showing by the Department that other information is necessary to identify and verify off-road sales, an invoice or sales ticket containing the above information is adequate and should be accepted.

I recognize the Department's authority to issue regulations. However, a regulation must be reasonable, Shellcast Corp. v. White, 477 So.2d 422, and a regulation requiring additional information not reasonably necessary to verify the sale as off-road is unreasonable.

The Department rejected otherwise adequate off-road invoices showing the seller as "BOS, Fayette, Alabama" because they did not specify where delivery occurred. That information is unnecessary because the sale would be tax-free regardless of where delivery occurred. Those invoices should be accepted.

The Department properly rejected the invoices that included only the initials "ORF". The Taxpayer's representative testified that "ORF" meant off-road fuel, not on-road fuel. But the Department should be able to determine from the invoice itself whether the fuel was sold for tax-exempt purposes. Subsequent

testimony interpreting the invoice should not be required or accepted.

The weekly sales summaries also do not comply with the above regulations and should not be accepted. The Department's regulations are reasonable insofar as they require individual sales tickets for each sale.

The Taxpayer argues that a distributor is liable only if the Department can prove that §40-17-11 (1), (2) or (3) is applicable. I agree that a distributor is liable only as described in §40-17-11. However, a distributor is required by both §40-17-7 and §40-17-21 to keep adequate records, and the burden is on the distributor to present records verifying non-taxable transactions. If a distributor fails to provide adequate records verifying off-road sales, the sales not properly documented as exempt must be taxed. State v. T. R. Miller Mill Co., 130 So.2d 185; State v. Ludlam, 384 So.2d 1089.

If the Taxpayer is correct, a distributor could fail or refuse to keep records and unless the Department obtained the necessary information from third party sources no tax would be due. Certainly that was not intended by the Legislature. The Department is not required to prove that a sale or distribution of fuel is taxable. Rather, the distributor must keep adequate records establishing that the fuel is exempt.

In summary, tax did not automatically accrue when the fuel was transferred from the bulk facilities to the retail outlets. Nor were the Taxpayer's sales taxable because they were made through a common pump. However, the Taxpayer was obligated to keep individual sales records verifying each off-road sale.

As discussed, some adequate invoices were either rejected or never considered by the Department. The Taxpayer should be allowed 30 days to resubmit those and any other similar invoices to the Natural Resources Division. The Department should then adjust the audit as indicated above and inform the Administrative Law Division of the adjusted amount due. A Final Order will then be entered setting out the Taxpayer's liability.

Entered on December 21, 1992.

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BILL THOMPSON
Chief Administrative Law Judge