STATE OF ALABAMA, DEPARTMENT OF REVENUE, vs. WILLIAMS OIL COMPANY P. O. Box 2069 Montgomery, AL 36102-2069, Taxpayer.	§ § § § § § §	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION Docket No. MISC. 92-175

FINAL ORDER

The Revenue Department assessed motor fuel tax against Williams Oil Company (Taxpayer) for the period September, 1988 through August, 1991. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on June 2, 1992. Dean Mooty represented the Taxpayer. Assistant counsel Dan Schmaeling represented the Department.

FINDINGS OF FACT

The Taxpayer is a licensed motor fuel distributor in North Alabama. The Department assessed the Taxpayer for additional motor fuel tax for the period September, 1988 through August, 1991. The Taxpayer does not contest the assessment except concerning diesel fuel sold through two service stations. The relevant facts concerning those sales are set out below.

The Taxpayer owns the stations in issue but leases the facilities to independent station operators. The Taxpayer delivered diesel fuel into a common tank at each station and the fuel was subsequently sold for both on-road and off-road purposes. The Taxpayer retained title until the fuel was sold at the pumps. The Department concedes that the on-road and off-road sales were separately metered and that accurate records were maintained as

required by §40-17-21. The station operators subsequently received a fixed pumpage fee for each gallon sold.

The Department contends that the two station operators are unlicensed retail dealers and that tax became due pursuant to §40-17-11(2) when the Taxpayer delivered the fuel into the supply tanks at the two stations.

The Taxpayer's position is that §40-17-11(1) applies, not §40-17-11(2). The Taxpayer argues that tax did not become due when the fuel was delivered to the stations, but only when the fuel was subsequently sold at the pumps for on-road use.

CONCLUSIONS OF LAW

This is another appeal involving the motor fuel taxes levied at §§40-17-2 ($.08 per gallon) and 40-17-220 ($.04 per gallon).

The motor fuel statutes are confusing and do not clearly set out when or even if a distributor should pay the tax. This naturally causes problems in administering the tax. Section 40-17-11 somewhat clarifies the situation by stating that a distributor (or storer) is not liable except in three circumstances:

> (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
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> (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.

Sales to a licensed distributor are also exempt, even if (1), (2) or (3) above applies. See, last clause of §40-17-11.

The Department argues that paragraph (2) applies and that tax accrued when the Taxpayer delivered the fuel into the supply tanks at the two stations. I disagree.

Distributors are liable only on "the basis of their sales", see, §40-17-3. Thus, §40-17-11(2) applies only if a distributor sells fuel and then delivers the fuel into the supply tanks of an unlicensed retail dealer.[1] Paragraph (2) does not apply if a distributor transfers fuel into his own retail tanks for subsequent sale or otherwise retains title until the sale at the pump. Section 40-17-11(1) applies in that case and the distributor is liable only on the fuel sold at the pump for on-road purposes.

Section 40-17-11(1) applies in this case because the Taxpayer owned the fuel until it was sold at the pumps. The Department concedes that the Taxpayer (through the independent operators) maintained proper records and that the sales were separately metered as required by §40-17-21. Consequently, the recorded off-

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[1]As discussed later, paragraph (2) has an even narrower scope of operation in that sales to an unlicensed retail dealer are taxable only if the fuel is delivered into a supply tank that is used to make only taxable on-road sales. Only in that case can the distributor know when he sells the fuel that the fuel will be used for taxable on-road purposes.

road sales are exempt and tax is due only on the fuel sold at the two stations for on-road purposes. The assessment should be adjusted accordingly and thereafter made final, plus applicable interest.

The above holding disposes of this case. However, because of the current confusion concerning the motor fuel taxes, set out below is a summary of how the motor fuel statutes should be interpreted and administered.

The motor fuel taxes are broadly levied on "the selling, using or consuming, distributing, storing or withdrawing from storage" of motor fuel, but only if the fuel is used on-road. A distributor is liable only on the basis of his sales, see §40-17-3, and then only in the three situations set out in §40-17-11. Reading those sections together, a distributor is liable only if he sells fuel (to an unlicensed purchaser) knowing or with good reason to know at the time of the sale that the fuel will be used for taxable on-road purposes. Common sense requires that a sale or transfer of fuel should not be taxed if it cannot be determined at that time that the fuel will be used for taxable on-road purposes.

Paragraph (1) of §40-17-11 is straightforward. Tax is due when a distributor pumps fuel directly into an on-road vehicle. Paragraph (3) likewise is clear that tax is due when a distributor otherwise sells fuel knowing or with good reason to know that it will be used on-road. In both (1) and (3), the distributor knows when he sells the fuel that it will be used for on-road purposes and tax should be paid at that time. Paragraph (2) is less clear

and has caused much of the confusion concerning the motor fuel taxes.

Paragraph (2) at first appears to tax all fuel delivered by a distributor into an unlicensed dealer's supply tank. But to be consistent with paragraphs (1) and (3), paragraph (2) should be construed to apply only if the dealer's supply tank is used to make only taxable on-road sales. Only in that case can the distributor (or anyone) know when he sells the fuel that it will be used for taxable on-road purposes.

A distributor is not liable if he sells and delivers fuel into an unlicensed dealer's common tank from which both on-road and off-road sales are made because the distributor cannot know at that time that the fuel will be used for taxable purposes. As will be discussed, the dealer then becomes liable and must pay tax on his subsequent on-road sales and keep records concerning the off-road sales. Section 40-17-21 also allows any dealer to make both taxable on-road and non-taxable off-road sales from the same tank and pump. If all fuel is taxed when delivered to an unlicensed dealer, the intent of §40-17-21 would be thwarted.

The Department's policy has been to tax all fuel delivered to an unlicensed dealer and then allow the distributor a subsequent credit for that portion later sold by the dealer for off-road use. But the fuel is either taxable when sold and delivered by a distributor or it is not. Allowing a distributor credit for later off-road sales is also impractical because the distributor's liability depends on whether the unrelated retail dealer separately

meters the sales and keeps adequate records as required by §40-17-21. A distributor's liability should not depend on whether a subsequent retail dealer does or does not keep good records.

Most problems encountered in administering the motor fuel taxes involve unlicensed dealers making on-road and off-road sales from a common tank and pump. In my opinion, those dealers should be licensed under §40-17-14 and should be required to report and pay tax on all subsequent on-road sales and separately meter[2] and keep good records concerning the off-road sales. Act 92-543 also requires all licensed dealers to prepare and maintain an exemption certificate for all off-road sales.

A dealer not properly licensed under §40-17-14 may be enjoined from operating pursuant to §40-17-20, but failure to obtain a license does not relieve the unlicensed dealer of liability. An unlicensed dealer making on-road and off-road sales from a common tank is still liable for tax on his on-road sales and must still keep good records and separately meter the off-road sales.

A retail dealer making only on-road sales need not be licensed because tax should be paid when the fuel is purchased from the distributor (§40-17-11(2) applies in this case). Once the tax is paid, no further reporting or record keeping is necessary.

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[2]Section 40-17-21 requires that all off-road sales must be "separately metered". The intent of §40-17-21 was to accommodate retail dealers by allowing them to sell both on-road and off-road fuel from the same tank. The Legislature did not intend to make all one meter pumps obsolete. Consequently, a dealer has complied with the separately metered requirements of §40-17-21 if a single meter on the pump is reset after each sale and the amount of each sale is individually recorded.

Likewise, a retail dealer making only off-road sales is not required to be licensed because he is not selling the fuel "for the operation of motor vehicles on the highways of this state". See, §40-17-14. However, as stated, all dealers making off-road sales must still keep good records confirming that the sales are for off-road purposes.

Finally, a dealer making on-road and off-road sales from separate tanks and pumps should pay tax to the distributor on the fuel delivered into the on-road tank (§40-17-11(2) applies), but not on the fuel delivered into the off-road tank. Again, records must be kept verifying the off-road sales, but if proper records are not kept by the dealer, including the Act 92-543 exemption certificate, the dealer is liable for the tax and not the distributor.

The present motor fuel law imposes a difficult administrative burden on the Department. Large wholesale distributors selling in bulk are liable only under limited circumstances, liability then passes to the numerous retail dealers. With passage of Act 92-543, liability now filters down to the even more numerous individual purchasers/users that buy from the dealers (or distributors) for off-road use. To insure that the proper tax has been paid, the Department must review the records of thousands of individual users. Hopefully, the Legislature will rewrite and simplify the statutes so that the tax can be more easily administered by the Department.

Entered on September 18, 1992.

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BILL THOMPSON
Chief Administrative Law Judge