

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

§

vs.

§

DOCKET NO. MISC. 92-225

BOBBY D. SHELTON
D/B/A BOBBY SHELTON'S GROCERY §
22855 HWY. 24
MOULTON, AL 35650 §

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§

Taxpayer.

FINAL ORDER

The Revenue Department audited and assessed motor fuel tax against Bobby D. Shelton, d/b/a Bobby Shelton's Grocery (Taxpayer) for the period February, 1989 through November, 1991. The Taxpayer appealed to the Administrative Law Division and a hearing was conducted on October 28, 1993. The Taxpayer appeared at the hearing. Assistant counsel John Breckenridge represented the Department.

The Taxpayer is a licensed motor fuel distributor and sold diesel fuel at his store in Moulton, Alabama during the period in question. The Taxpayer opened for business in 1986 or 1987. The Taxpayer's bookkeeper, Ms. Priscilla Holbert, contacted the Revenue Department at that time about what records the Taxpayer should keep to document exempt off-road diesel fuel sales. A Department agent subsequently visited Ms. Holbert at the Taxpayer's store and instructed her that off-road sales could be verified with a ledger showing (1) that the fuel was to be used off-road, (2) the date of the sale, (3) the number of gallons sold, (4) the sales price, and

(5) the purchaser's signature. The Taxpayer thereafter kept a ledger of all off-road sales as directed by the Department agent, and continued doing so during the period in question (See, Dept. Ex. 2).

The Department audited the Taxpayer twice prior to the audit in question. The Taxpayer's ledger was accepted as adequate in both audits, and both audits resulted in a refund or credit due the Taxpayer.

The Department subsequently conducted the audit in issue, rejected the Taxpayer's ledger as insufficient, and assessed tax on the disallowed exempt sales. The Department also corrected a mistake by the Taxpayer in reporting certain sales at \$.08 per gallon tax instead of the \$.12 per gallon tax actually due. The Taxpayer admits the mistake and has paid the \$.04 per gallon difference. The only issue in dispute is whether the Taxpayer's ledger should be accepted to verify off-road sales.

The Department argues that the ledger cannot be accepted because it does not comply with the record-keeping requirements of Department Reg. 810-8-1-.56.

Reg. 810-8-1-.56 was at issue in a previous Administrative Law Division case, Docket No. Misc. 89-121. In that case, the Department rejected a distributor's off-road invoices because they did not exactly comply with the regulation. Specifically, they were not serially or consecutively numbered, the distributor's name

was not printed at the top of each invoice, and the purchaser's address was not on each invoice. The Department's argument was rejected and the invoices were accepted because they substantially complied with the regulation and the information on the invoices was reasonably sufficient to verify that the fuel was sold for off-road use.

The ledger kept by the Taxpayer in this case should be accepted for two reasons. First, as in Docket No. Misc. 89-121, the Taxpayer's ledger, although it doesn't exactly comply with Reg. 810-8-1-.56, is reasonably sufficient to allow the Department to verify the Taxpayer's off-road sales. Second, the ledger should be accepted because the Department instructed the Taxpayer to keep the ledger in support of exempt off-road sales, and the ledger was accepted in two prior audits by the Department.

I acknowledge the rule that the Department cannot be estopped from collecting a tax based on erroneous advice given by a Department employee. State v. Maddox Tractor and Equipment Co., 69 So.2d 426. However, that rule applies only where the erroneous advice is contrary to a statute. That is, if a statute requires that tax is due or that certain specific records must be kept, the statute must be followed and a taxpayer cannot be relieved of liability because he followed contrary advice by a Department employee. However, the rule should not apply where the Department's erroneous advice is contrary to a Department

regulation but not a statute.

If a Department employee gives a taxpayer advice that is contrary to a regulation, but not a statute, the taxpayer should not be penalized for following that erroneous advice. The Taxpayer in this case should not be penalized for keeping his records as directed by the Department, especially where the records are reasonably sufficient to verify off-road usage. In short, the Department should be estopped from rejecting the very records that it instructed the Taxpayer to keep and which are in fact adequate to verify off-road sales.

For the above stated reasons, the Taxpayer's ledger should be accepted by the Department in support of the claimed off-road sales. Accordingly, the assessment is dismissed.

Although some of the information required by Reg. 810-8-1-.56 may be unnecessary to verify off-road sales, the Taxpayer is now on notice and should in the future keep separate invoices for each on-road and off-road sale. The off-road invoices should also substantially comply with the information requirements of the regulation.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g).

Entered on December 2, 1993.

BILL THOMPSON
Chief Administrative Law Judge