

STATE OF ALABAMA,
DEPARTMENT OF REVENUE,

vs.

ORANGE BEACH MARINA, INC.
P. O. Box 278
Orange Beach, AL 36561,

Taxpayer.

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STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

DOCKET NO. S. 93-197

FINAL ORDER

The Revenue Department assessed State, Baldwin County and City of Orange Beach sales tax against Orange Beach Marina, Inc. (Taxpayer) for the period September, 1989 through August, 1992. The Taxpayer appealed to the Administrative Law Division and the case was submitted on a joint stipulation of facts. Robert M. Galloway represented the Taxpayer. Assistant counsel Duncan Crow represented the Department. The Taxpayer operates a full service marina in Orange Beach, Alabama. The issue in dispute is whether diesel fuel sold by the Taxpayer to various vessels was exempt from sales tax pursuant to Code of Ala. 1975, §40-23-4(10). That section exempts fuel sold to vessels "engaged in foreign or international commerce or in interstate commerce". The vessels in issue are described in paragraph 6 of the joint stipulation as follows:

6. During the period in question, roughly 40% of the Taxpayer's sales were to charter fishing vessels, approximately 20% to vessels owned by businesses (the parties understand that "vessels owned by businesses" constitutes vessels owned by businesses, but which may be used for business or recreational purposes) and some 40% to pleasure craft. Virtually all of these vessels would have either proceeded across state lines or, more likely,

proceeded more than 3 miles from the shoreline, thus placing them in jurisdictions other than in the State of Alabama. Diesel fuel sales by the Taxpayer are almost exclusively to large yachts, as most smaller vessels use gasoline.

The Alabama Legislature passed Act 91-546 in 1991, which in part amended §40-23-4(10), retroactive to August, 1987.¹ This case turns on the proper construction of §40-23-4(10). The relevant sections of the exemption are set out below.

The first paragraph grants the exemption as follows:

The gross proceeds from the sale or sales of fuel and supplies for use or consumption aboard ships, vessels, towing vessels, or barges, or drilling ships, rigs or barges, or seismic or geophysical vessels, or other water craft (herein for purposes of this exemption being referred to as "vessels") engaged in foreign or international commerce or interstate commerce; . . .

The second paragraph contains various presumptions and statements clarifying what is intended by the first paragraph. The first two sentences of the second paragraph concern cargo vessels and read as follows:

For purposes of this subdivision, it shall be presumed that vessels engaged in the transportation of cargo between ports in the State of Alabama and ports in foreign countries or possessions or territories of the United States or between ports in the State of Alabama and ports in other states are engaged in foreign or international commerce or interstate commerce, as the case may be. For the purposes of this subdivision, the

¹ The provision giving the Act retroactive effect is found in §4 of the Act, but is not included in the Code. I question whether making an exemption retroactive violates §100 of the Alabama Constitution, which prohibits the forgiveness of a debt owed the State. However, for purposes of this Final Order, I will assume that the retroactive exemption granted by Act 91-546 was in effect during the period in question.

engaging in foreign or international commerce or interstate commerce shall not require that the vessel involved deliver cargo to or receive cargo from a port in the State of Alabama.

The next sentence concerns vessels
carrying
passengers for
hire, without
cargo:

For purposes of this subdivision, vessels carrying passengers for hire, and no cargo, between ports in the State of Alabama and ports in foreign countries or possessions or territories of the United States or between ports in the State of Alabama and ports in other states shall be engaged in foreign or international commerce or interstate commerce, as the case may be, if, and only if, both of the following conditions are met:

(i) the vessel in question is a vessel of at least 100 gross tons; and (ii) the vessel in question has an unexpired certificate of inspection issued by the United States Coast Guard or by the proper authority of a foreign country for a foreign vessel, which certificate is recognized as acceptable under the laws of the United States.

The remainder of the exemption is not relevant to this case.

The Taxpayer argues that "foreign or international commerce" and "interstate commerce" should be broadly defined to include all vessels, whether private or commercial, that travel from Alabama waters into international waters or the waters of another state and then back to Alabama. The Taxpayer argues that the second paragraph of the exemption contains only examples of foreign or interstate commerce and that the exemption should not be limited to those examples. I disagree.

The first paragraph grants the exemption, and the second paragraph defines or explains what was intended to be included

within the scope of the exemption. That is, the exemption applies only to fuel used in vessels transporting cargo between an Alabama port and a port in another state or foreign country, even if no cargo is loaded or unloaded in Alabama; and vessels carrying passengers for hire between an Alabama port and a port in another state or foreign country, but only if the passenger vessel is at least 100 gross tons and is certified by the U. S. Coast Guard or by a foreign country.

The vessels in issue are not cargo vessels and thus can only qualify for the exemption as passenger vessels. The statute is clear that fuel sold to passenger vessels is exempt only if passengers are being transported between an Alabama port and a port outside of Alabama. They were not in this case. The exemption also applies "if, and only if" the vessel is at least 100 tons and is properly certified. Use of the words "if, and only if" indicates that all other passenger vessels under 100 tons, such as the charter fishing vessels and pleasure craft in issue, were not intended by the Legislature to be exempt.

The above is supported by the legal maxim expressio unius est exclusio alterius (the expression of one thing is the exclusion of another). Ex Parte Kirkpatrick, 495 So.2d 1095. The Legislature made specific reference in the first sentence of the exemption to only vessels engaged in some commercial activity. Charter fishing boats, private pleasure craft and other non-commercial vessels could easily have been listed if the Legislature had intended to

include them in the exemption. They were not, nor were they included in the vessels described in the second paragraph.

Also, even if the terms "foreign commerce" and "interstate commerce" are broadly defined, I do not believe that non-commercial fishing vessels or pleasure crafts are engaged in interstate or foreign commerce when they travel from Alabama into international waters or the waters of another state. Interstate or foreign travel is not the same as interstate or foreign commerce. Rather, "commerce" requires some commercial transaction or trade between two states or nations. See generally, 15A, Am Jur.2d., Interstate Commerce, at pages 320-323.

The above conclusion is supported by the rule of construction that an exemption must be strictly construed against a taxpayer and for the Department. Brundidge Milling Company v. State, 228 So.2d 475.

The assessments in issue are upheld and judgment is entered against the Taxpayer for State sales tax in the amount of \$33,973.63, Baldwin County sales tax in the amount of \$13,541.08, and City of Orange Beach sales tax in the amount of \$16,986.83, all with additional interest computed from March 15, 1993.

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

Entered on November 8, 1993.

BILL THOMPSON
Chief Administrative Law Judge