

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 ON APPLICATION FOR REHEARING

A Final Order was entered in this case on November 8, 1993 holding that diesel fuel sold by the Taxpayer to charter fishing vessels and recreational or pleasure craft that traveled from Alabama into international waters or the waters of another state was not exempt from sales tax pursuant to Code of Ala. 1975, §40-23-4(10). The Taxpayer timely applied for a rehearing.

I have carefully re-examined the exemption statute in question and the Taxpayer's arguments relating thereto, and in my opinion the Final Order must be upheld.

The Final Order held that the second paragraph of the exemption statute contained an exclusive list of what was intended to be exempted, i.e. vessels carrying either cargo or passengers for hire. Upon review, I now recognize that the above holding is wrong. The first paragraph includes "towing vessels ... drilling ships, rigs ... or seismic or geophysical vessels". The Legislature clearly intended that fuel used in those vessels should be exempt if engaged in interstate commerce, although they do not carry passengers or cargo for hire as described in the second

paragraph.

However, I still do not believe that diesel fuel used in charter fishing vessels and private pleasure or recreational craft was intended to be exempt. If so, then every vessel that uses diesel fuel could purchase fuel tax free by claiming that it intended to fish or take a pleasure ride into international waters or into the waters of another state. For example, a pleasure boat leaving Orange Beach Marina could claim that it was going into the waters off Perdido Key, Florida and thereby be allowed to purchase diesel tax free. I do not believe that was intended by the Legislature, and certainly it is not specifically authorized by the language of §40-23-4(10).

Charter fishing vessels are a closer question, but again I don't believe that diesel fuel used in charter fishing vessels was intended to be exempt. Charter fishing vessels carry passengers for hire, although not between ports. The second paragraph of the exemption limits the exemption for vessels carrying passengers between ports to only vessels of more than 100 tons that are properly registered. Logically, the same limitations should also apply to vessels carrying passengers for hire, although not between ports.

The Taxpayer argues that an ambiguous taxing statute must be construed against the Department, citing City of Birmingham v. AmSouth Bank, 591 So.2d 473. However, that rule of construction

involves levying statutes. The rule concerning exemption statutes is just the opposite. That is, a statute granting an exemption or deduction must be strictly construed against the exemption, and any ambiguity must be decided in favor of the Department. Ex parte Kimberly-Clark Corporation, 503 So.2d 304. The exemption in this case is certainly unclear, at least as it relates to the exempt status of fuel used in charter fishing vessels and private pleasure craft. Consequently, the statute must be construed against the Taxpayer.

If the Legislature had intended to exempt fuel used in any fishing or recreational vessel that travels into international or another state's waters, it could easily have broadly worded the exemption to that effect. Thus, by listing only commercial vessels and requiring that they must be engaged in international or interstate commerce to be exempt, the Legislature clearly intended to exclude fishing and recreational vessels not engaged in commercial activities from the scope of the exemption.

The above considered, the Final Order previously entered in this case is upheld. This Final Order on Application for Rehearing may be appealed within 30 days pursuant to Code of Ala. 1975, §40-2A-9(g), and Department Reg. 810-14-1-.24.

Entered on December 16, 1993.

Chief Administrative Law Judge