

JET-PEP, INC.
P.O. Box 143
Holly Pond, AL 35083-0143,

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§

STATE OF ALABAMA
DEPARTMENT OF REVENUE
ADMINISTRATIVE LAW DIVISION

Taxpayer,

§

DOCKET NOS.

MISC. 97-431

MISC. 97-432

WEST OIL COMPANY, INC.
P.O. Box 489
Winfield, AL 35594,

§
§

Taxpayer,

§

v.

§

STATE OF ALABAMA
DEPARTMENT OF REVENUE.

§

FINAL ORDER

The Revenue Department assessed Jet-Pep, Inc. for motor fuel excise tax and a storage tank trust fund charge for April 1994 through April 1997. The Department also assessed West Oil Company, Inc. for motor fuel excise tax for May 1994 through March 1997. Jet-Pep and West Oil (together "Taxpayers") appealed to the Administrative Law Division pursuant to Code of Ala. 1975, §40-2A-7(b)(5)a. The appeals were consolidated, and a hearing was conducted on February 18, 1998. Dean Mooty represented the Taxpayers. Assistant Counsel Keith Maddox represented the Department.

The parties agree that the storage tank trust fund final assessment should be held in abeyance until the Alabama Attorney General issues an opinion relevant to the case. Consequently, the storage tank trust fund final assessment has been re-docketed as MISC. 97-431A, and will be decided apart from the motor fuel final assessments that are the subject of this Final Order.

This case involves Alabama's dyed motor fuel law enacted pursuant to Act 95-410. The dyed fuel law requires that diesel fuel intended for an off-road or other exempt use must be marked by red dye. Diesel fuel intended for a taxable on-road use is clear. The use of dyed fuel allows enforcement officials to easily determine if untaxed dyed fuel is being improperly used in on-road vehicles.

The Taxpayers are both licensed motor fuel distributors in Alabama. They sold clear diesel fuel tax-free for exempt agricultural purposes during the subject periods. Clear diesel may be sold tax-free for agricultural purposes, but only "if no dyed motor fuel is available from the agricultural user's supplier". Code of Ala. 1975, §40-17-2(3)d.

The primary issue is whether dyed fuel was "available" in this case within the context of §40-17-2(3)d. The Taxpayers also sold clear diesel fuel tax-free to pulpwooders, miners, and for other exempt off-road uses. A second issue is whether the Taxpayers are liable for tax on those sales of clear diesel.

Jet-Pep is located in Cullman County. West Oil is located in Marion County. Both Taxpayers purchased clear diesel fuel and gasoline from a motor fuel terminal in Birmingham during the subject periods. They delivered the products in their own large tanker trucks to their respective storage facilities in Cullman and Marion Counties. Both Taxpayers maintain on-site storage tanks for clear diesel and gasoline, but not for dyed diesel.

As stated, the Taxpayers sold clear diesel tax-free to agricultural users during the subject periods. The Taxpayers delivered the clear diesel from their on-site storage facilities to the customers in small delivery trucks.

Jet-Pep also sold dyed diesel fuel to two large agricultural users. Those customers purchased in large volume and had storage tanks that were accessible to Jet-Pep's large tanker trucks. Consequently, Jet-Pep purchased dyed fuel from the Birmingham terminal and delivered the fuel in its tanker trucks directly to its two large agricultural customers. The Department determined that dyed fuel was available for sale to all of the Taxpayers' agricultural customers, and accordingly assessed tax on the clear diesel sold to those customers. The Taxpayers appealed.

The Department argues that dyed fuel was "available" within the context of §40-17-2(3)d. because the Taxpayers could have purchased dyed fuel at the Birmingham terminal. The Department contends that the Taxpayers should not be allowed to choose which agricultural customers they sell dyed fuel to based on the convenience of delivery.

The Taxpayers counter that "available" should be construed from a practical standpoint. Their small agricultural customers have small storage tanks that are only accessible to small delivery trucks, not large tankers. Consequently, because the Taxpayers do not store dyed fuel at their facilities, they argue that for practical purposes, dyed fuel is not available for sale and delivery to those customers.

This is a difficult case. However, considering the intent of the dyed fuel law and the specific wording of §40-17-2(3)d., I must hold for the Department.

The dyed fuel law requires that only taxed, clear diesel can be used for taxable on-road purposes. The tax-free sale of clear diesel is not allowed, even for an exempt purpose, because the Department would be unable to determine on inspection if the untaxed clear diesel was being improperly used for a taxable on-road purpose. The sole exception is that clear diesel may be sold tax-free for agricultural purposes, but only if dyed fuel is not available. §40-17-2(3)d.

"Available" is not defined by Alabama law. "Supplier" is defined to include any motor fuel terminal in Alabama. §40-17-1(5). The Taxpayers concede that dyed fuel was available from their terminal in Birmingham during the subject periods. Consequently, because dyed fuel was available from the supplier, the Taxpayers were prohibited from selling clear fuel to their agricultural users. They cannot unilaterally elect to sell clear diesel to some customers because it is inconvenient to deliver dyed fuel to those customers.

The above finding should not be construed as holding that dyed fuel is available if it can be purchased from any supplier in Alabama. That is too broad a reading. Rather, dyed fuel is "available" in the context of §40-17-2(3)d. only if it can be obtained at the specific terminal or terminals from which the distributor purchases diesel.

A distributor may later claim a credit or refund on tax-paid clear diesel sold for off-road agricultural purposes. §40-17-2(2)i. Consequently, if the Taxpayers pay the tax in issue, arguably they could subsequently claim a credit or refund pursuant to the above section. If that is allowed, however, the §40-17-2(3)d. prohibition against selling clear diesel if dyed diesel is available would be meaningless. Distributors could sell clear diesel for agricultural purposes, whether dyed fuel was available or not. If they were later required to pay tax on the improperly sold clear diesel, they could simply claim a credit or refund for the amount paid.

It is presumed that the Legislature did not enact a meaningless statute. Druid City Hospital Board v. Epperson, 378 So.2d 696 (Ala. 1979). A statute should not be interpreted in such a way as to make it ineffective. Reserve National Insurance Co. v. Crowell, 614 So.2d 1005 (Ala. 1993). Consequently, by prohibiting the sale of clear diesel if dyed diesel is available, the Legislature could only have intended that if clear diesel is improperly sold in such instances, the distributor must pay tax on the otherwise exempt fuel.

The Department also argues that a portion of the assessed tax was based on clear diesel sold tax-free to pulpwooders, miners and other exempt users. The Department failed to include that issue in its Answer, and the Taxpayers' representative was unaware of the issue before the February 18 hearing.

In any case, §40-17-2 allows the tax-free sale of clear diesel only for agricultural purposes, and then, as discussed, only if dyed fuel is not available. Clear diesel cannot be sold tax-free for any other purpose. Consequently, the Taxpayers are also liable on the clear diesel sold tax-free to pulpwooders, etc.

A penalty may be waived for reasonable cause. Reasonable cause includes situations in which a taxpayer acts in good faith. Code of Ala. 1975, §40-2A-11(h). The Taxpayers in this case believed in good faith that they could sell clear diesel to their agricultural customers because they did not maintain an inventory of dyed fuel on-site. The penalties included in the final assessments are accordingly waived.

The motor fuel final assessments, less the penalties, are affirmed. Judgment is entered against Jet-Pep, Inc. for \$953.34, and against West Oil, Inc. for \$1,186.69, plus applicable interest.

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

Entered May 27, 1998.

BILL THOMPSON
Chief Administrative Law Judge

BT:ks

cc: Keith Maddox, Esq.
H. Dean Mooty, Jr., Esq.
Floyd Atkins