MIDSTREAM FUEL SERVICE, INC. BEAN DREDGING CORPORATION c/o KPMG Peat Marwick, LLP Suite 3500, One Shell Square New Orleans, LA 70139-3599,	'	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION
Taxpayer,	'	DOCKET NO. S. 98-306
v.	'	
STATE OF ALABAMA DEPARTMENT OF REVENUE.	'	

FINAL ORDER DENYING
TAXPAYER=S APPLICATION FOR REHEARING

The Final Order entered in this case on August 6, 1999 (1) denied a joint petition for refund of sales tax filed by Bean Dredging Corporation (ATaxpayer@) and Midstream Fuel Service, Inc. for March 1995 through December 1997, and (2) granted a use tax petition for refund of use tax filed by the Taxpayer for January 1995 through January 1998. The Taxpayer timely applied for a rehearing concerning the denied sales tax refund. The application is denied for the reasons explained below.

First, the application must be denied based on the rationale of State v. Dept. of Revenue v. Orange Beach Marina, 699 So.2d 1279 (Ala.Civ.App. 1997), cert. denied April 25, 1997. Although this case and Orange Beach Marina involve different types of Avessels,@ the rationale of Orange Beach Marina still applies. Specifically, the Court of Civil Appeals held that for the exemption at Code of Ala. 1975, '40-23-4(a)(10) to apply, Athe vessel, whether carrying cargo or individuals only, must travel between an Alabama port and another state=s or another country=s port.@ Orange Beach Marina, 699 So.2d at 1281. The

Taxpayer=s vessels did not travel between ports when it conducted its dredging activities in Alabama. The exemption thus does not apply.

As stated in the August 6, 1999 Final Order, at page 5, I respectfully disagree with the Court=s rationale in Orange Beach Marina as too narrow, although I agree with the ultimate holding in the case. But the Court=s decision in Orange Beach Marina is the current law on the subject in Alabama, and must be followed.

I also affirm my holding that even if Orange Beach Marina is ignored, the exemption still would not apply because the Taxpayer=s dredging activities did not involve foreign, international, or interstate commerce within the context of the subject exemption statute.

The Taxpayer, on pages 4 and 5 of its application for rehearing, vigorously argues the rule of statutory construction that a taxing statute must be construed for the taxpayer and against the Department. However, all of the cases cited by the Taxpayer, except one, involved a tax levy. While the Taxpayer is correct that a tax levy must be construed for the taxpayer, a tax exemption must be strictly construed for the Department and against the taxpayer. This is illustrated in the one case cited by the Taxpayer that involved an exemption, Eagerton v. Terra Resources, Inc., 426 So.2d 807 (1982). That case involved an exemption from Alabama=s oil and gas excise tax. The Taxpayer cites the case for the proposition that Ataxing statutes are to be construed strictly in favor of the taxpayer and against the taxing authority.@ But the above quote was taken out of context. The entire relevant portion of the opinion reads as follows:

> AExemptions from taxation are to be strictly construed against the exemption and in favor of the right to tax and the burden is on one seeking an exemption to clearly establish the right. Community Action Agency of Huntsville v. State, 406 So.2d 890 (Ala. 1981); Title Guarantee Loan & Trust Co. v. Hamilton, 238 Ala. 602, 193 So. 107 (1940); Brundidge Milling Co. v. State, 45 Ala.App. 208, 228 So.2d 475 (1969). To be sure, there is a countervailing rule of construction that taxing statutes are to be construed strictly in favor of the taxpayer and against the taxing authority. State v. Hall, 278 Ala. 359, 178 So.2d 518 (1965); Gotlieb v. City of Birmingham, 243 Ala. 579, 11 So.2d 363 (1943). We regard the exemption rule as more specific, however, and more directly pertinent to this case.

Eagerton v. Terra Resources, Inc., 426 So.2d at 809.

The statute in issue, Code of Ala. 1975, '40-23-4(a)(10), is an exemption statute. Consequently, it must be strictly construed for the Department and against the Taxpayer.

The Taxpayer argues that the numerous cases cited on pages 12 through 18 of its post-hearing brief require a holding that its dredging activities constituted interstate commerce for purposes of the exemption. I disagree. Those cases cited by the Taxpayer can be distinguished because they either (1) involved a vessel that actually traveled in commerce between states or outside of a state=s boundaries,[1] (2) involved the issue of whether the activity affected interstate commerce so as to be subject to Congress=s control under the Commerce Clause, U.S. Const., Art. 1, '8, cl. 3,[2] or (3) involved the

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[1]Alabama Department of Revenue v. Midstream Fuel Service, 521 So.2d 75 (Ala.Civ.App. 1988); Miller Transporters v. Ala. Pub. Serv. Com=n, 454 So.2d 1373 (Ala. 1984); Lord v. Steamship Company, 102 U.S. 541 (1880).

[2]Department of Revenue v. Association of Washington Stevedoring Companies, 435 U.S. 734 (1978); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939); The Daniel Ball v. United States, 77 U.S. 557 (1871).

issue of whether employees engaged in dredging work were covered by the Fair Labor Standards Act, 29 U.S.C. '213.[3]

Those cases in category (1) above can be distinguished because the Taxpayer in this case never left Alabama=s waters when it performed the dredging work. The vessels dumped the sludge in Alabama waters. Consequently, the dredging was never foreign, international, or interstate in nature.

Those Commerce Clause cases in category (2) above do not apply because the Commerce Clause has been broadly construed to apply to any activity that even indirectly affects interstate commerce. See Final Order, at 8. On the other hand, as indicated, the exemption statute in issue must be narrowly construed against the exemption. The phrase Aengaged in foreign or international commerce or in interstate commerce@ that is included in '40-23-4(a)(10) must be strictly interpreted to include only vessels that

[3]Cuascut v. Standard Dredging Corp., 94 F.Supp. 197 (D. Puerto Rico 1950); Sternberg Dredging Co. v. Walling, 64 F.Supp. 758 (E.D. Mo. 1946), *aff=d* 158 F.2d 678 (8th Cir. 1946); Walling v. Great Lakes Dredging Co., 149 F.2d 9 (8th Cir. 1945); Overstreet v. North Shore Corp., 318 U.S. 125 (1943).

actually engage in commerce while traveling from Alabama waters into foreign or international waters or the waters of another state. Engaging in an intrastate activity, which the Taxpayer=s vessels did in this case, is not sufficient.

Those cases in category (3) above involved the Fair Labor Standards Act. Like the Commerce Clause, and unlike the exemption statute in issue, the federal courts have broadly construed the Fair Labor Standards Act with respect to coverage. Cuascut v. Standard Dredging Corp., 94 F.Supp. 197 (1950):

> AIt was the purpose of the Act to eliminate from interstate commerce the evils attendant upon low wages and long hours of service. Being remedial, and having a humanitarian end in view, the Act is broad and comprehensive and is to be liberally construed with respect to coverage. McComb v. Farmers Reservoir & Irrigation Co., 10 Cir., 167 F.2d 911, 913, and cases cited therein. The breadth of the coverage intended is made clear in Walling v. Jacksonville Paper Co., 564, where the court said, 317 U.S. at page 567, 63 S.Ct. at page 35, 87 L.Ed. 460: >It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce.=@

Cuascut v. Standard Dredging Corp., 94 F. Supp. at 200.

Applying the above rule of construction, the federal courts have given the phrase Ainterstate commerce@ the same broad scope of coverage for purposes of the Fair Labor Standards Act that it has for Commerce Clause purposes. Again, that broad, liberal construction does not apply to the exemption statute in issue, which must be narrowly construed.

Finally, the Taxpayer cites Standard Dredging Corp. v. State, 122 So.2d 280 (Ala. 1960) for the proposition that dredging Mobile Bay constitutes interstate commerce for

purposes of the subject exemption. Again, I disagree.

Standard Dredging contracted to dredge Mobile Bay. The issue in the case was whether Alabama could require Standard Dredging to obtain a license to perform the work. One of the company=s arguments was that it was engaged in interstate commerce, and requiring it to obtain an Alabama license would unduly burden interstate commerce in violation of the Commerce Clause. The Alabama Supreme Court did not decide whether the dredging activity involved interstate commerce, but held that even assuming that it did, Alabama was not prohibited from requiring Standard Dredging to obtain a license.

> AThe trial court held the license tax not to be violative of the commerce clause (United States Constitution, Art. 1, '8, Cl. 3) for the reason that it >was directed at the privilege of the appellant carrying on certain local activities within the State of Alabama.= We find no error in this holding. In so concluding we assume, without deciding, that Standard=s activities constituted interstate commerce within the meaning of the commerce clause.@

Standard Dredging Corp. v. State, 122 So.2d at 286.

I do not dispute that dredging Mobile Bay constitutes an activity that affects interstate commerce for Commerce Clause purposes. But as discussed, the broad standard for determining if an activity sufficiently affects interstate commerce for Commerce Clause purposes does not govern whether a vessel is Aengaged in interstate commerce@ for purposes of the exemption statute in issue.

This Final Order Denying Taxpayer=s Application for Rehearing may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, '40-2A-9(g).

Entered November 5, 1999.